

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**FILED**  
4:20 p.m.  
FEB 20 2004

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U.S. COURT OF APPEALS

KEVIN COOPER,

Plaintiff,

v.

RICHARD A. RIMMER, Acting Director of the California Department of Corrections, and JEANNE WOODFORD, Warden, San Quentin State Prison, San Quentin, California,

Defendants.

Case No. 04-99001

**DEATH PENALTY CASE**

**APPELLANT'S PETITION FOR REHEARING AND  
REQUEST FOR REHEARING *EN BANC*  
AND, IN THE ALTERNATIVE, MOTION TO WITHDRAW  
ORDER AS MOOT**

DAVID T. ALEXANDER (Bar No. 49996)  
LISA MARIE SCHULL (Bar No. 196132)  
ANNE HAWKINS (Bar No. 209135)  
Orrick, Herrington, & Sutcliffe LLP  
400 Sansome Street  
San Francisco, California 94111  
Telephone: (415) 392-1122  
Facsimile: (415) 773-5759

Attorneys for Plaintiff Kevin Cooper

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## **INTRODUCTION AND STATEMENT OF COUNSEL**

By this motion, plaintiff requests that an *en banc* panel of this Court reconsider the three-judge panel's affirmation of the district court's denial of a temporary restraining order ("TRO"). In the alternative, plaintiff requests that the Court vacate the three-judge panel's opinion as the matter is now moot. The question originally presented to this Court was whether there was a sufficient showing to support entry of a temporary restraining order to prevent Kevin Cooper's execution by lethal injection while he litigated the constitutionality of that method. Mr. Cooper offered the district court and this Court clear and uncontroverted proof that the lethal injection procedure in California ("Procedure 770") raises serious questions as to whether it constitutes cruel and unusual punishment. The balancing of hardships was overwhelmingly in favor of Mr. Cooper. In a published opinion issued on February 8, 2004, a three-judge panel rejected Mr. Cooper's appeal of the denial of the TRO and application for a stay of execution. The panel found that the district court was correct when it held: (1) that Mr. Cooper unduly delayed in presenting his claims; and (2) that the challenge to lethal injection fails here because such challenges have failed elsewhere. Mr. Cooper now seeks an order withdrawing the Court's order as moot because the execution has been stayed to an undetermined future time.

The issues presented here are of exceptional importance: (1) may the state foreclose judicial review of an unconstitutional method of punishment by enacting procedures that prevent a timely application; (2) may a district court and

this Court consider delay in presenting a lethal injection challenge when that delay is not of plaintiff's making and caused no prejudice or harm to defendants; and, (3) what showing must a plaintiff make in order to litigate his claim of an Eighth Amendment violation arising from the method of execution, when there is clear and uncontested evidence of botched executions by the State. Under the district court's and the panel's interpretation, all avenues of relief are foreclosed to any plaintiff in California solely because of a device created by the State. Every such lawsuit will be saddled with delay, and all will be denied no matter the merits, unless an undefined "exceptional circumstances" is found. Apparently, a showing of serious question that a State's executions are not proceeding correctly is insufficient.

### **ARGUMENT**

#### **I. MR. COOPER'S STAY OF EXECUTION ISSUED BY THE EN BANC PANEL RENDERS THIS APPEAL MOOT AND THE PANEL OPINION MUST BE VACATED AND THE APPEAL DISMISSED AS MOOT**

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It is well settled in this Circuit that where intervening events have rendered a complaint moot, the proper course is to vacate the previous opinion. *See Li v. Eddy*, 324 F. 3d 1109 (9th Cir. 2003). In this matter, the order below denying a TRO was only appealable as a final order because Mr. Cooper's execution was imminent. *Northern Stevedoring & Handling Corp. v. International Longshoremen's & Warehousemen's Union*, 685 F.2d 344 (9th Cir. 1982). Mr. Cooper appealed the denial of the TRO, seeking thereby to stay his execution. Within 10 hours of the panel's decision denying the TRO, an *en banc* panel of this

Court granted a stay of execution and granted plaintiff's motion for permission to file a successor writ of habeas corpus. This Court's prior opinion and the ruling of the district court were rendered moot. *See Doe v. Madison School Dist.*, 177 F.3d 789 (9th Cir. 1999) (panel's decision rendered moot; opinion vacated). The mandate has not issued and the decision is not final, in any event. There is no impediment to vacating the panel's and district court's opinion, and Mr. Cooper is now free to litigate his habeas claims in due course, without the need for injunctive relief or a showing beyond one necessary to survive a judgment on the pleadings, which must be brought in the district court initially.

**II. CALIFORNIA CONDEMNED PRISONERS CANNOT BE FORCED BY OPERATION OF STATE STATUTE AND THIS COURT'S CASE LAW TO WAIT UNTIL THE LAST MINUTE TO PRESENT CLAIMS, AND THEN BE BARRED FROM REVIEW BECAUSE OF DELAY**

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The District Court's opinion, and the panel's decision, both prevent any California prisoner from ever challenging the method of execution barring "exceptional circumstances" or a showing of "cause," and neither opinion determines which standard applies or when, what either means, and cites no authority for this holding. The basis for both decisions was Mr. Cooper's alleged delay in bringing his lawsuit, based on *Gomez v. United States District Court*, 503 U.S. 653 (1992).<sup>1</sup> However, it was an abuse of discretion to apply *Gomez* and to consider delay that occurred before Mr. Cooper was even able to bring suit.

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<sup>1</sup> While citing *Gomez* in his opinion, Judge Fogel clearly stated on the record that he did not see this as a *Gomez* case. (E.R. at 406.)

Mr. Cooper's claim is ripe only when the method of execution is either chosen by the inmate or it is chosen for him. *See Stewart v. LaGrand*, 526 U.S. 115, 119 (1999); *Fierro v. Terhune*, 147 F.3d 1158 (9th Cir. 1998) (section 1983 claim not ripe until method of execution is selected).<sup>2</sup> That does not occur in California until ten (10) days after the Warden presents the warrant to the inmate (usually two or three days after the warrant is issued by the Superior Court). Cal. Penal Code § 1193(a); Title 15 Cal. Code Regs. § 3349(a). The State should be estopped from relying on delay as a factor to weigh against Mr. Cooper in these circumstances. *See Jarro Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829 (2002) (barring one with unclean hands from asserting a defense of estoppel or laches). However, the previous decisions ignored this real dilemma, created solely by the state, and allowed this delay to be a basis for weighing against issuance of a TRO.

The District Court and the panel arrive at this catch-22 by applying an incorrect legal standard, one derived from *Gomez*. (Ninth Circuit Opinion dated February 8, 2004 ["9th Cir. Op."] at 7.) *Gomez* applies, however, only if there is some showing of a "manipulation of the judicial process"<sup>3</sup> so egregious as to equate a lawsuit under 42 U.S.C. section 1983 with a successor habeas petition.

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<sup>2</sup> In the district court, Mr. Cooper raised this ripeness argument in his reply to the state's delay defense, and the court rejected it. It was raised again before the Panel.

<sup>3</sup> In *Gomez*, manipulation included the filing of at least four applications for stay in the last hours before the scheduled execution.

*See Gomez*, 503 U.S. at 654. The district court here did not find such egregious conduct on Mr. Cooper's part. (E.R. at 406, 418) The panel, however, felt that the use of *Gomez* to weigh Mr. Cooper's delay against granting his application was appropriate. (9th Cir. Op. at 7.) Without the threshold finding of such manipulation, or any predicate determination of when Mr. Cooper should have filed his complaint, the use of any alleged delay to weigh against a plaintiff is against settled legal principles established in *Gomez* itself.

This is perhaps why of all the lethal injection cases cited by defendants, and those selected by the district court and the Panel, none of them rely on *Gomez*. *See Vickers v. Johnson*, No. 03A633, 2004 WL 168080 (U.S. Jan. 28, 2004); *Zimmerman v. Johnson*, No. 03A606, 2004 WL 97434 (U.S. Jan. 21, 2004); *Beck v. Rowsey*, 124 S.Ct. 980 (2004).<sup>4</sup> In fact, so few cases have relied on *Gomez*, and the Supreme Court has not once invoked it except to distinguish it, that it is safe to say its holding of evaluating a section 1983 stay of execution application under abuse of the writ principles is saved for those rare situations when there is clear evidence of manipulation by a habeas petitioner.

In this Circuit, section 1983 challenges are the accepted method of raising Eighth Amendment lethal injection claims. *Fierro v. Gomez*, 77 F.3d 301, 306 (9th Cir. 1996), *opinion vacated on other grounds*, 519 U.S. 918 (1996).

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<sup>4</sup> The district court clearly relied on an erroneous legal premise by relying on Supreme Court denials of stays in last minute lethal injection cases to support its delay finding. This was pure legal error as stay orders are not precedent. *Barefoot v. Estelle*, 463 U.S. 880, 907 n. 5 (1983).

Unless and until an *en banc* panel holds otherwise, the Panel cannot force plaintiffs into a situation where they cannot bring such lawsuits. Mr. Cooper would face the very same ripeness difficulties in the context of a habeas corpus petition, in any event. *See Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998).<sup>5</sup>

Even if one were to apply the successor habeas standards to Mr. Cooper's motion, it would still be proper. Under the AEDPA, a successor petition can be brought as long as there is good reason why it could not have been made earlier. 28 U.S.C. § 2244(b). New evidence can be introduced under the same principles. 28 U.S.C. § 2254(e). *See Williams v. Taylor*, 529 U.S. 420 (2000) (court cannot preclude review under section 2254(e) unless there is a finding of a lack of diligence).

Obviously, because Mr. Cooper could not have brought his action much sooner than he did, he would easily satisfy these principles. Even under pre-AEDPA standards, the fact that the courthouse doors were closed to him is certainly cause – a feature external to the defense. Moreover, the state court's actions in failing to honor Mr. Cooper's counsel of his choice has greatly hindered present counsel's efforts in many arenas, not merely this one.

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<sup>5</sup> In a footnote, the panel describes a claim raised by Mr. Cooper in a previous habeas petition related to lethal injection. (9th Cir. Op. at 7 n.2.) But, that was not a challenge to lethal injection itself, only to the method by which California had failed to provide an election after death by gas had been declared unconstitutional. That was remedied by the current statute, and the claim rendered moot. Cal. Penal Code § 3604.

### **III. MR. COOPER IS NOT CHALLENGING LETHAL INJECTION AS A METHOD OF EXECUTION**

Both the panel and the district court go to great pains to address whether lethal injection is an accepted method of executing the condemned, and then conclude that it is. Both decisions explain that if the sedative agent is administered properly, Mr. Cooper will be unconscious. Both decisions, however, misinterpret Mr. Cooper's complaint and proofs.

Mr. Cooper is not challenging lethal injection; he is challenging Procedure 770 as applied in California. All parties agree that if the proper dose of sodium pentothal were to be given in the proper fashion, it would be enough to render nearly every human being unconscious. All parties also agree that if the dose is not properly administered, death by pancuronium or potassium chloride would be inhumanely excruciating. All parties also agree that as a result of the pancuronium, should the sedative not work properly, those who are administering the drugs, and all the other witnesses, would not be able to determine whether the sedative was working properly because all voluntary movement would be impossible while the inmate is still conscious.

#### **A. The Panel Misunderstood Mr. Cooper's Allegations With Respect to the Chemicals Used in the Lethal Injection Procedure**

The panel's discussion of what Mr. Cooper offers by way of proof is not accurate by any means. (9th Cir. Op. at 5.) The initial misunderstanding stems from the panel's assessment of the district court's opinion which found that Mr. Cooper had not "met his burden of showing that the use of Pavulon (pan-

curonium bromide) is inhumane and unnecessary. According to defendants and their experts, a principal purpose of Pavulon is to stop an inmate's breathing. Plaintiff has not articulated a compelling argument that this is not a legitimate state interest in the context of an execution." (9th Cir. Op. at 3-4.) The district court's conclusion does not take into account the fact that cessation of respiratory function can be achieved without the use of pancuronium bromide. (E.R. at 45, ¶ 9.) It also misses the main argument – that pancuronium can and will prevent any proper monitoring of the sedative agent, sodium pentothal, to ensure unconsciousness and such dangers are now a reality. (E.R. at 49 ¶ 20.) The dangers associated with this drug and the inability to ensure proper sedation have lead veterinarian associations and the California Legislature to forbid its use in animal non-livestock euthanasia. Cal. Penal Code §§ 597, 599(b); Cal. Bus & Prof. Code §§ 4800-4917. (E.R. at 304-31.) Incredibly, the California procedures for execution by lethal injection have never been subjected to review by any public body, whether legislative, judicial or administrative, as was the procedure for euthanasia of animals.

As the panel further describes the proofs below, it discusses the opinion of Dr. Dershwitz, an expert put forward by defendants to show that five grams of sedative are enough to fully anesthetize an inmate. But, as Mr. Cooper has told the courts time and time again, no one disputes this point. The question is whether in California the safeguards are in place to ensure that the procedure is administered properly and that the large dose of sodium pentothal actually reach

the inmate. As to those questions, Dershwitz is remarkably silent.

Even under the defendants' evidence, we know that nearly every lethal injection execution in California has not been conducted in a manner that avoids excruciating and unnecessary pain . Dr. Dershwitz states that breathing will stop within a minute of application of the sedative. (9th Cir. Op. at 6.) Not a single execution in California has caused the inmate to stop breathing in one minute, and Mr. Cooper offered medical logs and witness testimony to prove it. (E.R. at 131-34.) Neither of the defendants' experts, nor the Warden, addressed these execution logs and their significance.

In fact, neither the panel nor the district court address Mr. Cooper's proof by way of medical logs and eyewitness observations. The panel merely concludes that Mr. Cooper "makes no case that there are material difference in California's process" than Arizona's, which have been upheld. (9th Cir. Op. at 8.) But, that is not the question here – the question is whether California's procedure satisfies the standards set forth by the Eighth Amendment. It stands or falls on that procedure and its implementation.

**B.     The California Procedures Have Proved Different In Application Than Prior Decisions By This Court Addressing Lethal Injection Procedures In Other States**

The panel swiftly concludes that it has "previously upheld the constitutionality of lethal injection as a method of execution." (9th Cir. Op. at 7.) As discussed above, that is besides the point. This case is nothing like either *Poland v. Stewart*, 117 F.3d 1094, 1105 (9th Cir. 1997), or *LaGrand v. Stewart*, 133 F.3d

1253, 1264-65 (9th Cir. 1998), the cases cited by the panel opinion as dispositive on the issue of the constitutionality of lethal injection. (9th Cir. Op. at 7-8.) Both cases, addressing Arizona's lethal injection procedure, involved a clear lack of evidence that the processes were flawed other than in a general sense. The witness accounts in *LaGrand* were that the process was without incident. Nor is the case like *Campbell v. Wood*, 18 F.3d 662, 682 (9th Cir. 1994), cited for the proposition that no execution method is perfect (9th Cir. Op. at 8.), where the plaintiff alleged generally that the procedures in place did not account for the risk of error.

Finally, contrary to the Panel's decision that "the district court's findings" regarding whether the protocol assures the desired sedative effect is supported in the record (9th Cir. Op. at 9), **the district court never reached this question.**<sup>6</sup> Instead, much like the Panel, the district court focused on whether lethal injection was a proper method in general, and dismissed Mr. Cooper's showing as one of speculative risks from an uncertain procedure. It never addressed Mr. Cooper's powerful, particularized showing.

Mr. Cooper has presented the affidavit of an eyewitness to a botched execution in California. Margo A. Rocconi recounts the difficulties in finding a vein in Mr. Anderson's arm. (E.R. at 128-130.) Once the catheters were finally inserted and the chemicals began to flow, Rocconi witnessed that "his cheeks be-

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<sup>6</sup> This is a fundamental error on the Panel's part – there has been no finding that Mr. Cooper's showing regarding botched executions and related faulty procedures is insufficient to meet the merits standard for a TRO.

gan puffing as if air were coming out of his mouth. Within moments after that, Mr. Anderson's chest and stomach area began to heave upward. The convulsions continued with some irregular pauses in between." (*Id.* ¶ 6.) In all, "[m]ore than 10 and less than 15 minutes elapsed from the time that Mr. Anderson had closed his eyes until the guard announced that he was dead." (*Id.* ¶ 7.) As explained by Dr. Heath. Ms. Rocconi's description of the execution, "does not comport with a successful administration of a large dose of pentothal." (E.R. at 51 ¶ 24.) Rather, the continued struggle to breath is consistent with an individual fighting against the development of paralysis induced by pancuronium bromide. (*Id.*) Even defendants' experts would be forced to conclude that the sedative did not have the desired effect.

Dr. Heath, in his analysis of the execution logs, identified additional problems with the executions- problems with drug administration not readily apparent to witnesses with no medical training. (E.R. at 51-52, ¶ 25.) Dr. Heath noted that a second dose of pancuronium was administered during the execution of William Bonin, stating that it "is difficult to understand why additional pancuronium was administered," and that the "administration of redundant and inappropriate doses of pancuronium raises enormous concerns about the discipline, logic, medical judgment, and rigor that was applied to the conduct of this execution." (*Id.*)

The declaration of Dr. Michael L. Radelet provides further support for Mr. Cooper's position that California lethal injection executions have resulted

in unnecessary pain. (E.R. at 332-45.) Radelet identifies problems with the executions of Keith Daniel Williams (*Id.* ¶ 15), Thomas M. Thompson (*Id.* ¶ 20.), Jaturun Siripongs (*Id.* ¶ 23), Manuel Babbit (*Id.* ¶ 24), and Darrell Keith Rich (*Id.* ¶ 25). This evidence refutes the district court's and the panel's conclusions that Mr. Cooper's allegations of pain and suffering are "purely speculative." (9th Cir. Op. at 8.) Rather, such possibility of unnecessary pain and suffering has been actually realized in California a result of the methods and practices contained in Procedure 770.

**C. The Numerous Botched Executions Highlight the Problems Inherent in Procedure 770**

Arthur Calderon, the former Warden at San Quentin, himself described the stresses of properly administering lethal injections, and acknowledged that the procedures are complex and challenging. (E.R. 55 ¶ 31.) Calderon's concessions, combined with the eyewitness accounts and the expert review of the execution procedures presented by Mr. Cooper, constitute a showing that the problems with Procedure 770 are not speculative or fanciful and raise "serious questions."

Procedure 770, developed without the review of medical professionals, contains problems from the very start. It begins by instructing the execution team to jerry-rig the injection site in a non-standard fashion. (E.R. 53-54 ¶ 29.) As explained by Dr. Heath, the procedure, "dictates an altered use of the 'Y' injection site by requiring the diaphragm on the site to be peeled back so that it can be removed for insertion of syringe tips instead of a needle." (*Id.*) Heath was un-

aware of any such medically-approved use of this equipment, and questioned why the departure from standard practice was not explained in the procedures. (*Id.*)

Once the Y-site and catheters have been inserted into the inmate, Procedure 770's guidelines provide no assistance regarding the timing of the administration of the drugs. (E.R. at 52 ¶ 26.) This increases the risk that the pancuronium bromide will be active while the sodium pentothal wears off. (*Id.*) The protocol fails to provide procedures to ensure the proper preparation of the drugs used. (E.R. at 52 ¶ 27.) There are no descriptions of the qualifications or experience required of the individuals assisting with the execution. (*Id.*) Without such descriptions, and without any information available as to the identities of these individuals, the risk that the execution will be performed by individuals who lack the requisite training and experience is significant. (E.R. at 53 ¶ 28.) Each of these procedural defects contributes to the likelihood that the inmate will not actually receive the proper dose of sodium pentothal, and will not be properly anesthetized during the lethal injection procedure. The ill-designed protocol also increases the likelihood that botched executions resulting in unnecessary pain, such as those described above, will continue to occur in the State of California.

Mr. Cooper is not challenging lethal injection as a method of execution – he is challenging California's procedures; ones that we know are flawed and that have resulted in botched executions. It matters not that lethal injection is used in other states. The question is, what is happening in California, and why are condemned inmates dying in a manner inconsistent with the state's own as-

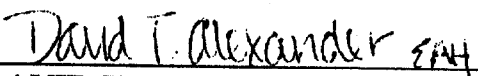
sumptions?

**CONCLUSION**

For the foregoing reasons, plaintiff Kevin Cooper respectfully requests a rehearing or a rehearing *en banc* to reconsider and reverse the Panel's opinion as moot or, alternatively, withdraw the opinion. In that alternative, Mr. Cooper requests that the *en banc* panel consider the weighty questions raised by California's statutory scheme and the lethal injection procedure as currently administered.

Respectfully submitted,

February 20, 2004

  
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DAVID T. ALEXANDER  
Counsel of Record for Petitioner  
*Orrick, Herrington & Sutcliffe LLP*  
*400 Sansome Street*  
*San Francisco, California 94111*  
*(415) 392-1122*

**CERTIFICATE OF COMPLIANCE TO FED. R. APP. R. 32(A)(7) AND  
CIRCUIT RULE 32-1**

I, David T. Alexander, certify that:

Pursuant to Ninth Circuit Rule 40-1(a), the attached request for Rehearing and Rehearing *En Banc* is proportionately spaced, has a typeface of 14 points or more and contains 3,340 words.

Dated: February 20, 2004

David T. Alexander EAH  
David T. Alexander  
Attorney for Plaintiff-Appellant Kevin  
Cooper

DECLARATION OF SERVICE

I am over the age of eighteen years old and not a party to the above-entitled action. My place of employment and business address is Orrick, Herrington & Sutcliffe LLP, Old Federal Reserve Bank Building, 400 Sansome Street, San Francisco, California 94111.

On February 20, 2004, I served a copy of Appellant's Petition for Rehearing and Request for Rehearing *En Banc* and, in the Alternative, Motion to Withdraw Order as Moot placing a true copy thereof enclosed in a sealed envelope designated by Federal Express with delivery fees provided for and delivering it to a Federal Express office in San Francisco, California authorized to receive documents, addressed to the following at their respective office addresses last given, as follows:

BILL LOCKYER, ESQ.  
Attorney General of the State of California  
HOLLY D. WILKENS, ESQ.  
Deputy Attorney General  
110 West A Street, Suite 1100  
San Diego, California 92101

MR. FREDERICK K. OHLRICH  
Court Administrator and  
Clerk of the Supreme Court  
Supreme Court of California  
Earl Warren Building  
350 McAllister Street  
San Francisco, California 94102

and causing it to be personally delivered to:

///

///

///

KEVIN COOPER  
C-65304-3-EB-82  
San Quentin Prison  
San Quentin, California 94974  
CONFIDENTIAL LEGAL MAIL

I declare under penalty of perjury under the laws of the  
State of California that the foregoing is true and correct and that this docu-  
ment was executed on February 20, 2004 at San Francisco, California.



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Eileen Van Matre